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Supreme Court, U.S.
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No. 95-613

IN THE

Supreme Court of the United States

OCTOBER TERM, 1995

RAUL L. SARDUY,

Petitioner,

v.

BELLSOUTH TELECOMMUNICATIONS, INC.,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI

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November 13, 1995

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QUESTION PRESENTED

(1) Whether the district court properly granted summary judgment and dismissed Sarduy's claim under §510 of the Employee Retirement Income Security Act of 1974, as amended, after it determined that Sarduy had not pursued the claim and appeal procedure available to him under the terms of his Pension plan.

(2) Whether the district court properly granted summary judgment and dismissed Sarduy's claim under the Age Discrimination In Employment Act of 1967, as amended, after it conducted a *de novo* review of the record and found that Sarduy had not presented sufficient evidence to place material facts in dispute or to rebut the non-discriminatory explanation offered by BellSouth Telecommunications, Inc. for his termination.

PARTIES TO THE PROCEEDING

PETITIONER:

Raul L. Sarduy

RESPONDENT:

BellSouth Telecommunications, Inc. (formerly doing business as Southern Bell Telephone and Telegraph Company)

PARENT CORPORATION OF BELLSOUTH TELECOMMUNICATIONS, INC.

BellSouth Corporation

NON WHOLLY-OWNED SUBSIDIARIES OF BELLSOUTH TELECOMMUNICATIONS, INC.

None.

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JURISDICTION

The judgment of the Court of Appeals for the Eleventh Circuit was entered and filed on April 14, 1995. The Court of Appeals denied a timely petition for rehearing which was entered and filed on June 1, 1995.

The jurisdiction of this Court has been invoked under 28 U.S.C. § 1254(1).

STATEMENT OF THE CASE

The Petitioner, Raul L. Sarduy ("Sarduy") was a management employee of Respondent BellSouth Telecommunications, Inc. ("BST"). Sarduy was terminated for poor performance. (R1-38 — 316 through 317, 319 through 320)[1] At the time of his termination, Sarduy was 54 years of age, and based on his combined age and years of service with BST, would have been eligible to retire with an immediate service pension in approximately 2½ more years.

In Sarduy's Complaint, he alleged that he had been terminated because of his age in violation of the Age Discrimination In Employment Act of 1967, as amended, 29 U.S.C. § 621 *et seq.* ("ADEA"). (R1-1 ¶¶ 4-14) Sarduy also alleged that he was terminated by BST in order to interfere with his ability to accrue sufficient service so that he would become pension eligible in violation of § 510 of the Employee Retirement Income Security Act of 1967, as amended, 29 U.S.C. § 1001 *et seq.* ("ERISA"). (R1-1 ¶¶ 16-22)

On November 16, 1990, BST filed a motion for summary judgment. (R2-65) That motion was referred by the district court to a magistrate judge. Following a hearing, the magistrate judge recommended that BST's motion be granted as to both counts of the Complaint. (R2-77) Sarduy filed objections, and the matter was reviewed *de novo* by the district court. (R2-78)

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[1] Record citation is to the record as it was constituted before the Court of Appeals for the Eleventh Circuit, or, where possible, to the Appendix incorporated into Sarduy's petition.

On April 24, 1991, the district court adopted the magistrate judge's recommendation to dismiss Sarduy's ERISA count since the court found that Sarduy failed to exhaust administrative remedies available to him under the BellSouth Management Pension Plan (the "Pension plan"). The district court rejected the magistrate's recommendation to dismiss Sarduy's ADEA count in recognition of Sarduy's claim that he had not had adequate time to pursue discovery relevant to that count. (App. at B3-6)

On April 2, 1992, BST filed a follow-up motion for summary judgment directed toward Sarduy's remaining ADEA count. (1st SR2-131) After conducting a second *de novo* review of the entire record, the district court granted BST's summary judgment motion, holding that Sarduy had not produced sufficient evidence to place material issues of fact in dispute or to rebut BST's presentation of a non-discriminatory reason for his termination. (App. at D50-51)

ARGUMENT

Sarduy's Petition For Writ Of Certiorari raises routine evidentiary, discovery, and procedural disputes that were considered and correctly decided both by the trial and the appellate courts. The petition does not allege a departure from the accepted and usual course of judicial proceedings by either court that would warrant United States Supreme Court review.

I. The ERISA Claim.

Sarduy's ERISA claim was brought pursuant to § 502, ERISA's civil enforcement provision, based upon an alleged violation of § 510. The "right" allegedly interfered with by BST in this case was Sarduy's right to attain "his full pension benefit." Specifically, Sarduy contended that he needed approximately 2½ more years of service in order to be eligible for a full, non-deferred pension, and that BST terminated him in order to avoid this additional pension liability. (R1, ¶¶ 4, 7)

Among the arguments raised in its summary judgment, BST asserted that Sarduy's failure to exhaust the Pension plan's administrative remedies warranted dismissal. (R2-65 — 38-40) *Mason v. Continental Group, Inc.*, 763 F.2d 1219, 1224-1227 (11th Cir. 1985), *cert. denied*, 474 U.S. 1087 (1986) (exhaustion of plan remedies held to be prerequisite to filing a lawsuit under § 510 of ERISA). The district court concurred in BST's legal analysis. (R2-82 — 2) Since there was no factual dispute that Sarduy did not exhaust Pension plan remedies,[2] and no evidence that it would have been futile for him to pursue that claim and appeal procedure, the district court did not abuse its discretion in dismissing Sarduy's ERISA count. *See Curry v. Contract Fab. Inc. Profit Sharing Plan*, 891 F.2d 842, 846-847 (11th Cir. 1990).

During his appeal, and in his Petition For Writ Of Certiorari, Sarduy suggested that it would have been futile to pursue the Pension plan's claim and appeal procedure on the theory that there were no administrative remedies available to "a former employee who, although vested, had not yet applied for retirement pension ..." (Pet. at 23-24) Sarduy did not, and still has not, identified the evidence upon which he relies in making this claim, nor did he bring the existence of this evidence to the attention of the district court. Thus, the only evidence of record during Sarduy's appeal remained that of the Pension plan's administrator. That individual, who was familiar with Sarduy's situation, testified that the Plan embodied a claim and appeal procedure through which Sarduy could have pursued his specific claim, and that he failed to do so. (R2-65 — Brooks Aff. ¶¶ 4, 7)

Sarduy also takes issue with the district court's refusal to grant him an additional discovery extension before considering BST's motion for summary judgment. (Pet. at 16) Sarduy's argument is not well-taken.

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[2] In his report and recommendation, the magistrate judge made a similar finding. Although Sarduy filed objections to the magistrate's report, no objection was made on that point. In its order, the district court viewed Sarduy's failure to object as further corroboration that no issue of material fact existed. (App. at B3)

As of January 15, 1991, the date on which BST first argued its summary judgment motion to the magistrate judge, Sarduy had had over 1½ years to pursue discovery, and had done so through his various attorneys. At the time that BST argued its motion, no discovery was outstanding, and no motions to compel were pending. Sarduy, therefore, was not thwarted in his ability to oppose BST's motion by the lack of an opportunity to pursue discovery.

The foregoing conclusion particularly is compelled given the basis on which Sarduy's ERISA claim was dismissed, i.e., Sarduy's failure to exhaust the Pension plan's claim and appeal procedure. Administrative appeals under the Pension plan could be pursued by a participant or the participant's representative. In either case, the participant normally would have personal knowledge of the appeal process, including knowledge of, and perhaps physical control over the documents sent to and received from the Pension plan administrators. Thus, if Sarduy in fact had pursued his Pension plan appeal rights, he would have been well-equipped to introduce evidence to that effect, evidence that would have placed the facts material to BST's argument at issue, precluding the entry of summary judgment. Such a challenge could have been mounted without any access to discovery from BST.

In addition to Sarduy's allegation that he was denied access to evidence through discovery, he asserts that the district court erred in granting BST's summary judgment motion and dismissing his ERISA claim on the ground that it adopted the magistrate judge's report and recommendation before having read a transcript of the summary judgment hearing. (Pet. at 17) Sarduy advanced this argument in the absence of any evidence that the district court had not read the hearing transcript. Even if it had not, however, the district court had the full benefit of the magistrate judge's report and recommendation which it reviewed in conjunction with an independent review of the entire record, and the objections filed by Sarduy. (App. at B1)

II. The ADEA Claim.

During the proceedings before the district court, Sarduy did not allege the existence of any direct evidence of age discrimination. Likewise, Sarduy made no meaningful attempt at a statistical showing. In the memorandum filed in support of its motion for summary judgment, therefore, BST assumed that Sarduy had no alternative but to advance his ADEA claim using the *McDonnell Douglas* paradigm. *McDonnell Douglas Corp. v. Green*, 411 U.S. 792 (1973). Acting upon that assumption, BST's memorandum in support of its summary judgment presented the alternative arguments that: 1) Sarduy had not stated a *prima facie* case, but even if he had done so, 2) the facts material to his termination were not in dispute and established that he was terminated for legitimate, non-discriminatory reasons. (1st SR2-131-36)

Under the local rules of the District Court for the Southern District of Florida, the non-movant may file a brief in response to a summary judgment motion, but a surreply brief is not permitted, absent leave of court. (App. at D22, n. 2) Sarduy filed a response to BST's motion. In its reply brief, BST chose to narrow the focus of its earlier argument by conceding, for purposes of that brief alone, that Sarduy had stated a *prima facie* case of age discrimination. (R3-169 — 4-5)

Sarduy argued both to the trial and appellate court, and still maintains, that he was surprised by this tactic, and that he was prejudiced by the district court's refusal to allow him to file a surreply brief in which he would have presented evidence of pretext. (R4-189 — 6-8) In its order granting BST's summary judgment motion, the district court considered Sarduy's argument at great length. The district court found that:

1. BST's initial memorandum of law put Sarduy on notice that the Company was arguing both that he had not pursued a *prima facie* case and that it had stated a

legitimate, non-discriminatory reason for terminating him. (App. at D20-21)

2. Sarduy had ample opportunity to challenge both arguments in his response brief, as well as during oral argument before the magistrate. (*Id.*)

3. In his reply brief, BST neither presented new argument or evidence, nor did it raise arguments beyond those necessary to rebut Sarduy's response. (App. at D22, n. 2)

4. Sarduy's motion to file a surreply brief contained no suggestion that he sought to introduce evidence beyond that already submitted. (*Id.*)

Under the circumstances, Sarduy was not hindered in his ability to oppose BST's motion for summary judgment, and the district court acted well within its discretion in denying his request to file a surreply brief. *Manor Healthcare Corp. v. Lomelo*, 929 F.2d 633-639 (11th Cir. 1991) (ruling of trial court will not be disturbed if premise upon which court exercised its discretion was correct)

CONCLUSION

Through his petition, Sarduy seeks nothing more than another opportunity to challenge the correctness of the decision below. Sarduy has not raised a question of judicial misfeasance. Instead, he asks this Court to undertake a third *de novo* review of the record, and to reconsider the trial court's denial of his request to extend discovery, its refusal to allow him to file a surreply brief, and its evaluation of the evidence relative to the summary judgment standard. Such issues do not call for an exercise of this Court's power of supervision, and Sarduy's Petition For Writ Of Certiorari should be denied.

This 13th day of November, 1995.

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